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THE JOINT BANK ACCOUNT IN ILLINOIS

Kenneth L. Strong*

SOME TIME between the days of Blackstone and the present, confusion has entered the law pertaining to the joint ownership of personal property. Blackstone was able to state: "Things personal may belong to their owners, not only in severalty, but also in joint tenancy, and in common, as well as real estate. . . . But if a horse, or other personal chattel, be given to two or more, absolutely, they are joint tenants hereof; and unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements."¹ And he was right at the time the statement was made.² Unhappily, one "thing personal," the joint bank deposit, has in Illinois become the subject of poorly drafted statutes, ill-conceived policy, and far too many loosely phrased judicial opinions until today, the most recent opinion on the subject laments that joint bank accounts have had an "uneasy career" in the courts of this state.

The joint bank account with the attendant right of survivorship is a convenient and attractive device to the public for accomplishing the transfer of funds upon a person's death and it should be available in a more certain, even if more formal, manner than it now is. It is not suggested that the joint bank deposit is a

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¹ Bl. Comm., Vol. 2, Ch. 24, p. 403.

² Morley v. Bird, 3 Ves. Jun. 628, 30 Eng. Rep. 1192 (1798).

panacea deserving of general acclaim but it cannot be denied that it has its place in the law of personal property, which is a sufficient justification for a more definite application of the law.

I. THE STATUTORY LAW

Section 2 of the Joint Rights and Obligations Act³ governs joint bank deposits in Illinois. Strangely enough, this section basically purports to abolish joint tenancies in personal property. Then, in the form of an exception, the first paragraph of Section 2 permits joint ownership of personal property when created by will, "*or other instrument in writing* expressing an intention to create a joint tenancy in personal property with the right of survivorship."⁴ (Emphasis added.) Subsection (a) of Section 2, following the first paragraph thereof, deals exclusively with joint bank deposits and it is there stated in the form of a proviso, that: "When a deposit in any bank . . . has been made or shall hereafter be made in the names of two or more persons payable to them when the account is opened or thereafter, such deposit or any part thereof . . . *may be paid* to any one of said persons whether the other or others be living or not, *and* when an agreement permitting such payment is signed by all said persons at the time the account is opened or thereafter the receipt or acquittance of the person so paid *shall be valid and sufficient discharge from all parties to the bank for any payments so made.*"⁵ (Emphasis added.)

That portion of Section 2 purporting to abolish joint tenancies in personal property reflects an old public policy unfavorable to the right of survivorship.⁶ Also, it is significant that those parts of Section 2 which permit joint ownership of personal property with the right of survivorship are set forth as an exception and a proviso to the general rule of abolition. Lastly, subsection (a)

³ Ill. Rev. Stat. 1955, Vol. 1, Ch. 76, § 2.

⁴ Ibid.

⁵ Ibid.

⁶ In re Estate of Wilson, 404 Ill. 207, 88 N. E. (2d) 662 (1949). See also, Tiffany, Law of Real Property (1939), 3rd Ed., Vol. 2, § 424.

of Section 2 deals exclusively with joint bank deposits and contains two provisions on that subject joined by the conjunctive "and." The first provision permits the depository bank to pay the proceeds of a deposit made in the names of two or more persons to the survivor. The second provision discharges the bank when such payment is made pursuant to an agreement permitting such payment when it is signed by the parties.

The significance of an unfavorable policy to the incident of survivorship is perhaps obvious. Its effect is to place a somewhat vague but heavy burden of proof upon the one claiming the benefits of the right of survivorship that is not easily overcome with the various types of "instruments in writing" that Section 2 apparently condones.

Absent historical perspective, it is difficult to understand why there is a policy against a concept as popular as the right of survivorship. Anciently, as Blackstone put it, the law was quite the reverse and, unless there was some evidence of a contrary intention, a conveyance or transfer to two or more persons was held to be in joint tenancy.⁷ This early common law rule was not long the law in Illinois, if it ever was, for in 1821 an Act was passed by the General Assembly abolishing joint tenancies⁸ and, in various forms and contexts, that provision has remained in the law. Though it is clear enough why joint tenancies in real property ceased to be looked upon with favor,⁹ exactly why joint tenancies in personal property came to be disfavored is obscure. In fact, no convincing rationale for this policy has been found though efforts have been made to explain it. One former Judge of the Illinois Supreme Court found justification of the policy because, with joint tenancies, the incident of survivorship made

⁷ The statement is quoted at note 1, ante.

⁸ Ill. Rev. Stat. 1845, p. 299.

⁹ "This leaning in favor of joint tenancy would seem to indicate a desire to lessen the feudal burdens of the tenants, since only one suit and service was due from all the joint tenants, and on the death of one joint tenant the other acquired his share free from the burdens in favor of the lord which ordinarily accrued on the death of the tenant of land. With the practical abolition of tenures, however, the reason for such policy ceased. . . ." Tiffany, *Law of Real Property* (1939), 3rd Ed., Vol. 2, § 421, p. 201.

"no provision for posterity."¹⁰ Presumably, it was thought socially undesirable to permit a surviving joint owner to succeed to the deceased joint owner's interest in the property to the exclusion of the heirs and next of kin of the decedent to whom the property would be distributed were it not for the incident of survivorship. If this is the offense committed by the incident of survivorship then in those situations, which in fact are common, where the surviving joint tenant is also the surviving spouse or a descendant of the deceased joint tenant, then the unfavorable policy should not apply, for in those cases the incident of survivorship serves merely as an alternative method through which posterity is served. However, no such discriminate application of the policy has been suggested by the cases. Another judge saw the incident of survivorship as offensive because it is secret and places creditors at a disadvantage.¹¹ The charge of secrecy is, of course, frivolous since joint tenancies in personal property are no more secret than any other unrecorded transfer. As to the rights of creditors, if possession by one of property that will not become a part of his estate upon his death justifies a policy in general against the right of survivorship, all questions of reliance by creditors and fraud aside, then it would follow that there should be a similar unfavorable policy against every legal institution that permits possession without absolute ownership of personal property by a debtor. Furthermore, the unfavorable policy should then be limited only to those cases where creditors are trying to reach assets of a deceased joint tenant. The cases expounding the policy do not so limit it.

It is believed that the general policy against the incident of survivorship is of questionable justification and if it can be justified at all, its application should be limited to its rationale, whatever that may be. As it now appears in Section 2 of The Joint Rights and Obligations Act, it serves only as a verbal crutch for judicial opinions that have difficulty standing upon firmer ground.

¹⁰ *Illinois Trust and Savings Bank v. Van Vlack*, 310 Ill. 185, at 195, 141 N. E. 546, at 549 (1923). Thompson, J. made the statement referred to in the text in his dissent filed with the majority opinion.

¹¹ This attitude is expressed by Gunn, J. in the case of *In re Estate of Wilson*, 404 Ill. 207, 88 N. E. (2d) 662 (1949).

The second observation concerning Section 2 of The Joint Rights and Obligations Act, that those provisions which permit joint ownership in personal property or joint ownership of bank deposits are set forth as exceptions and provisos, is significant because they, as exceptions and provisos, are subjected to the rule of strict construction.¹² Again the one claiming rights as a survivor is placed at the unnecessary disadvantage of being required to prove strict compliance with a statute stated only in general terms.

The third observation, that subsection (a) of Section 2 deals exclusively with joint bank deposits and, on that subject, makes two statements, raises the basic question of whether subsection (a) exclusively controls the creation of joint bank deposits or whether the first paragraph of Section 2 is applicable. If the former part of Section 2 controls, the further question arises as to what part of subsection (a) controls. And if not, then the question arises as to what effect subsection (a) has upon the creation of joint bank deposits. A review of the case law will show how Section 2 has been construed by the reviewing courts of Illinois.

II. THE CASE LAW

Litigation over joint bank deposits typically arises out of one of the two following situations:

CASE ONE: Husband (H) opens a savings account in a bank (B) by making a deposit therein in the names of himself and his wife (W) as joint tenants with the right of survivorship. When the deposit was made, H and W both signed an instrument, supplied by B, which provided that the savings account was held by H and W as joint tenants with the right of survivorship and

¹² Because the language of Section 2, which permits joint ownership of bank deposits, appears as an exception or proviso, it is strictly construed leaving the statement abolishing joint tenancies in personal property standing as the general rule. Sutherland, *Statutory Construction* (Horack's 3rd Ed., 1943), Vol. 2, § 4933, p. 471 and § 4936, p. 474. For authority that Section 2 of the Joint Rights and Obligations Act has been so construed, see: *Doubler v. Doubler*, 412 Ill. 597, 107 N. E. (2d) 789 (1952); *In re Estate of Wilson*, *supra*, n. 11; and *David v. Ridgely-Farmers Safe Deposit Co.*, 342 Ill. App. 96, 95 N. E. (2d) 725 (1950).

that B was expressly authorized by the signatories to pay the deposit to either, both, or the survivor. This instrument was styled a "signature card" on its face. The funds deposited were supplied entirely by H and he kept the pass book which was issued by B in the names of H and W. H dies survived by W.

CASE TWO: H makes a deposit in B with his own funds and B issues a certificate of deposit, by the terms of which the deposit is made payable to H or W, or the survivor, upon the return of the certificate properly indorsed by either. This certificate is found in a safety deposit box located in B upon H's death. He was survived by W who had access to the deposit box during H's life.

Case One represents a typical "savings account"¹³ case and Case Two is a typical "certificate of deposit"¹⁴ case with an additional "deposit box" issue.¹⁵ Though it is recognized that there are other types of accounts and deposits, it is believed that the above are adequate to review the cases construing Section 2. At the outset, it must be remembered that the subject matter in both situations are choses in action arising from the debtor-creditor relationship that exists between the general depositor and the bank.¹⁶ It is also worth noting that neither the instrument

¹³ Until sufficient cause for separate treatment appears from the cases, the reference to savings account cases include cases involving checking accounts. It is recognized that actual as well as legal distinctions exist between the two but until the relevance of these differences becomes significant, it is considered appropriate to treat them as one.

¹⁴ A deposit for which a certificate of deposit is issued varies considerably from a savings account. Actually, a certificate of deposit is in the nature of a promissory note and may either be negotiable or non-negotiable. *Michie on Banks and Banking*, Perm. Ed., 1950, Vol. 5B, § 313 et seq. Such a certificate is issued by the bank and payment is made upon the return of the certificate properly indorsed. This certificate is typically the only written evidence that the right of survivorship is contemplated by the parties. The signature card evidencing the joint savings or checking account is a memorandum signed by the parties and is retained by the bank. It is more nearly a contract between the bank and the depositor than is a certificate of deposit.

¹⁵ Money and other personal property placed in a deposit box rented from a banking institution is not a deposit. Subsection (a) of Section 2 of the Joint Rights and Obligations Act does not apply to this type of situation. In re Estate of Wilson, *supra*, n. 11. But it is possible to create a joint tenancy with the right of survivorship in the contents of a deposit box as in other personal property.

¹⁶ *Logemeyer v. Fulton State Bank*, 384 Ill. 11, 50 N. E. (2d) 694 (1943); *People v. McGraw Electric Co.*, 375 Ill. 241, 30 N. E. (2d) 903 (1940); *Baier v. O'Connell*, 365 Ill. 208, 6 N. E. (2d) 140 (1937); *People v. Sheridan Trust and Savings Bank*, 358 Ill. 290, 193 N. E. 186 (1934); *People v. Farmers State Bank*, 338 Ill. 134, 170 N. E. 236 (1930).

signed by H and W in Case One nor the certificate of deposit issued in Case Two necessarily evidence a legally binding contract between H and W although both are, in a literal sense, written instruments.

A. SAVINGS ACCOUNT CASES

The initial inquiry raised by Case One is, of course, whether or not W is entitled to the deposit as a survivor, which, in turn, depends upon compliance with Section 2 of the Joint Rights and Obligations Act. The Illinois decisions can be classified into four distinct positions on the problem. With one exception, none of the opinions representing or following these varying positions has acknowledged the other theories expressed in the cases.¹⁷

The first view, first in the sense that it was the earliest position taken by the reviewing courts since Section 2 took its present form,¹⁸ is represented by a line of cases starting with *Illinois Trust and Savings Bank v. Van Vlack*.¹⁹ Under facts similar in all essential respects to Case One, it was there decided that the

¹⁷ The reviewing courts of Illinois would probably not agree with this classification, for the reference to various cases in such opinions as *In re Schneider's Estate*, 6 Ill. (2d) 180, 127 N. E. (2d) 445 (1955), and *Doubler v. Doubler*, 412 Ill. 597, 107 N. E. (2d) 789 (1952), indicate that no inconsistency is present in the courts' view. It may be conceded that the positions taken on the problem are not necessarily inconsistent but they do represent distinct attitudes as is developed in the text.

¹⁸ The original act abolishing joint tenancies contained no exceptions or provisos. Ill. Rev. Stat. 1845, p. 299. In 1917, a proviso was added to the effect that when a deposit is made by two or more persons payable to them jointly and is evidenced by a writing signed by them, such deposit may be paid to any one or the survivor of them. This amendment further provided that when a signed agreement is executed by all the parties the receipt or acquittance of any person so paid would be a sufficient discharge for the bank. Ill. Rev. Stat. 1917, Ch. 76, § 1. In 1919, because of another revision, Section 2 took what is now its present form, excepting subsequent amendments that do not bear on the problem. That is, an exception to the general rule against joint tenancies in personal property was made in the cases of executors, trustees, and where by will or other instrument in writing a joint tenancy with the right of survivorship was expressly declared. Furthermore, the requirement of a signed writing was deleted from the first part of the 1917 proviso which related specifically to bank deposits. Ill. Rev. Stat. 1919, Ch. 76, § 2.

¹⁹ 310 Ill. 185, 141 N. E. 546 (1923). This case was selected as the first of a line, not because it was the first decision that started Illinois on this particular path for that distinction is held by *Erwin v. Felter*, 283 Ill. 36, 119 N. E. 926 (1918), a certificate of deposit case decided some time before Section 2 took its present form. Nor was the *Van Vlack* decision the first one involving Section 2 as it applies to bank accounts since the deposit had been made prior to the enactment of that section. But it was the first case decided by the Illinois Supreme Court after Section 2 took its present form and it contained strong dicta as to how it would have been decided had Section 2 applied.

surviving widow was entitled to the deposit on the theory that the signature card executed by her and the decedent had the legal effect of a contract and thus the survivor had a clear right to the deposit as a matter of contract. This and subsequent decisions²⁰ appear to have given legal sanction to an executed signature card as a sufficient instrument in writing, as required by the first paragraph of Section 2. It follows that, according to the Van Vlack cases, subsection (a) of Section 2 did not exclusively control the creation of joint ownership with the right of survivorship in savings accounts and that subsection (a) was regarded as merely a statutory means by which depository banks could protect themselves against liability after payment of the deposit in question had been made to the survivor when, in fact, no right of survivorship existed.²¹

The Van Vlack line of cases had other ramifications. Since these cases repeatedly held that if there was a sufficient instrument in writing providing for the right of survivorship, there was compliance with Section 2, and Illinois came to be known as a "contract theory" state.²² That is, survivorship rights arose when the written instrument so provided, and the incident of survivorship did not depend upon the existence of a valid testamentary instrument, gift or trust. The designation of Illinois as

²⁰ *Cuilini v. Northern Trust Co.*, 335 Ill. App. 86, 80 N. E. (2d) 275 (1948): Signature card providing for survivorship upheld notwithstanding evidence of a contrary intent; *In re Estate of Halaska*, 307 Ill. App. 183, 30 N. E. (2d) 117 (1940): Survivorship right upheld, though the deposit was made prior to the 1919 amendment, on the theory that the incident of survivorship could be created by contract; *In re Estate of McIlrath*, 276 Ill. App. 408 (1934): Signature card providing for survivorship signed by decedent and wife upheld in spite of a post-nuptial agreement purporting to settle the wife's rights as a widow; *Vaughn v. Millikin Nat. Bank*, 263 Ill. App. 301 (1931): Survivorship rights accrued though survivor had not signed signature card; *Siemianoski v. Union State Bank*, 242 Ill. App. 390 (1926): A rubber stamp agreement on the bank records signed by the depositor and his wife held sufficient to confer a right of survivorship upon the surviving wife.

²¹ At least five states having similar statutory provisions have construed the proviso to be solely a bank acquittance method. *Godwin v. Godwin*, 141 Miss. 633, 107 So. 13 (1926); *New Hampshire Sav. Bank v. McMullen*, 88 N. H. 123, 185 A. 158 (1936); *Gordon v. Toler*, 83 N. J. Eq. 25, 89 A. 1020 (1914); *In re Morgan*, 28 Ohio C. A. 222 (1918); *Marshall & Ilsley Bank v. Voigt*, 214 Wis. 27, 252 N. W. 355 (1934).

²² See the dissenting opinion of Hershey, J. in the case of *In re Schneider's Estate*, 6 Ill. (2d) 180, 127 N. E. (2d) 445 (1955) to the effect that Illinois was considered a "contract theory" state.

a "contract theory" state was very misleading because the contract, if any, is between the depositor and the bank while the transfer contemplated by Section 2 is primarily that between the depositor and the survivor. Thus unless the contract between the depositor and the bank could suffice to establish a contract relationship between the depositor and the survivor, the survivor would not be able to support his claim to the deposit by contract. If the survivor were a signer of the agreement, it might be argued that the contract also evidences an agreement between the depositor and the survivor.²³ Otherwise, the only basis in contract law upon which the survivor could rely would be the third party beneficiary doctrine.²⁴ In reality, as has been stated, the situation fits no common law category, and the only logical basis upon which the transfer pursuant to the incident of survivorship could be placed, as construed by the Van Vlack cases, is that it was purely a creature of the statute requiring an instrument in writing which was met by a signature card executed by the depositor. As a concept governed solely by the first paragraph of Section 2, it was unimportant to determine who made the initial deposit, where possession of the pass book lay, whether there was consideration for the instrument in writing, whether subsequent deposits or withdrawals in or from the account were made, whether a donative intent was present, or whether the four common law unities necessary for a common law joint tenancy were present,²⁵ or even whether the instrument in writing was evidence of any understanding between the depositor and the survivor.

²³ If the survivor was a signatory with the depositor when the account was opened, the problem would be one of consideration between the depositor and the survivor. This problem has been met by evidence that the survivor had performed some services for the depositor during his life: *Armstrong v. Morris Plan Industrial Bank*, 282 Ky. 192, 138 S. W. (2d) 359 (1940); or that an executed contract needs no consideration to give it effect: *Sage v. Flueck*, 132 Ohio St. 377, 7 N. E. (2d) 802 (1937).

²⁴ *Rhorbacker v. Citizens Bldg. Ass'n Co.*, 138 Ohio St. 273, 34 N. E. (2d) 751 (1941); *In re Staver's Estate*, 218 Wis. 114, 260 N. W. 655 (1935).

²⁵ It is not so fantastic as it may seem that the common law rules of joint tenancy may have current application to joint bank deposits if the first paragraph of Section 2 governs their validity, for it was stated in the case of *In re Estate of Wilson*, 404 Ill. 207, at 214, 88 N. E. (2d) 662, at 666, that: "We might comment in passing that the latest pronouncement of this court affecting personal property, *Hood v. Commonwealth Trust and Savings Bank*, 376 Ill. 413, indicates that the four unities must coexist to create a joint tenancy in personal property."

Thus, until the case of *In re Wilson's Estate*,²⁶ where a second and distinct position emerged, the only very serious question in joint savings account cases was the sufficiency of the writing employed to create the right of survivorship, and with the ordinary signature card being upheld as adequate, Case One would probably go in favor of W under the Van Vlack authorities.

The Wilson case held that the personal property contained in a safety deposit box²⁷ rented by the decedent and his wife did not pass to the survivor even though there was a memorandum found in the box purporting to confer the right of survivorship to the contents thereof upon the surviving spouse. The court was of the opinion that there was not a sufficient writing identifying the property to be transferred and that the writing did not purport to affect a transfer within the meaning of the first paragraph of Section 2 which controlled. However, the surviving widow was awarded the proceeds of a joint bank account created by the decedent with his own funds because, as the court held, subsection (a) and not the first paragraph of Section 2 controlled the creation of joint rights in bank accounts. If the court was correct in saying that subsection (a) of Section 2 controls, then the requirement that joint deposits be created by a writing proves to be elusive. The only part of subsection (a) which requires a writing purports to set forth a method by which banks may be released from possible double liability and does not deal with the creation of joint rights in deposits as such. That a joint bank deposit must be created by a written instrument is inherent from a reading of subsection (a) cannot be denied, but neither can it be denied that no express provision exists as Section 2 is construed by the Wilson case.

Next in line is the case of *Doubler v. Doubler*,²⁸ which repre-

²⁶ 404 Ill. 207, 88 N. E. (2d) 662 (1949).

²⁷ The question of joint rights in the contents of safety deposit boxes is beyond the scope of this article except in those cases where bank deposits are also involved as in the Wilson case. In addition to the Wilson case, the following decisions are "deposit box" cases: *David v. Ridgely-Farmers Safe Deposit Co.*, 342 Ill. App. 96, 95 N. E. (2d) 725 (1950); *In re Estate of Brokaw*, 339 Ill. App. 353, 90 N. E. (2d) 300 (1950); *In re Estate of Koester*, 286 Ill. App. 113, 3 N. E. (2d) 102 (1936); *In re Estate of Jirovec*, 285 Ill. App. 499, 2 N. E. (2d) 354 (1936).

²⁸ 412 Ill. 597, 107 N. E. (2d) 789 (1952).

sents a third view that has been taken by the Illinois Supreme Court on a Case One situation. There it was held that subsection (a) of Section 2 did not control the *creation* of joint bank deposits but rather that the first paragraph of Section 2 applied, as that paragraph was construed by the Wilson case. At first glance, it looks like the Doubler case goes back to the Van Vlack cases and, to the extent that the court in that case regarded the first paragraph of Section 2 as controlling, that is true. But that case also held that in order to create a joint savings account with the right of survivorship, there must not only be an instrument in writing, but that writing must also evidence a definite agreement and be signed by the parties. Consequently, the survivor failed in the Doubler case because the written notation in the pass book was not proved to evidence an "agreement" nor was it signed by the depositor and the survivor.

The latest pronouncement by the highest Illinois court on a Case One set of facts was made in the case of *In re Schneider's Estate*,²⁹ where a fourth position was taken by the Supreme Court. There it was held that parol evidence was admissible to show the presence or lack of a gift to the survivor, and that the survivor could not prevail upon the evidential force of a signed signature card alone. The court reasoned that the signature card was not a contract and, absent a transfer to the survivor by a contract, a transfer by gift had to be proved. As plaintiff was unable to show the necessary donative intent on the part of the depositor, he failed.

The dissenting opinion in the Schneider decision pointed out that the majority had abandoned the "contract theory" in favor of the "gift theory" in order to avoid the limitations imposed by the parol evidence rule upon the intention finding process. This was wrong, according to the dissent, because signature cards *are* contracts in fact and do express the relationship and rights contemplated by the parties. It may well be true, as the dissent suggests, that adherence to a rule that permits the admission of

²⁹ 6 Ill. (2d) 180, 127 N. E. (2d) 445 (1955).

parol evidence to show the intention of the parties outside of the particular instrument involved will commit Illinois to the "gift theory" and create more confusion. However, the majority position will at least make it possible to apply the same test to all bank deposits, regardless of type, something that could not theretofore be done as indicated by a comparison of the savings account cases with the certificate of deposit cases discussed below. But if the Schneider decision gave uniformity to the law in this field, it did so at the expense of whatever certainty that previously existed because the legal efficacy of the executed signature card has been lessened to the status of an inconclusive writing which, even under the Doubler decision, was binding if it amounted to a signed agreement between the parties.

Therefore, under the law as construed by the Schneider decision, Case One would probably not be decided in favor of W, for although the signed signature card complies with Section 2, there is nothing in the facts to indicate that a gift was intended.

As confusing as the savings account cases are, it would be something of a blessing if a controversy involving a joint savings account could be accurately analyzed solely in view of these decisions. However, the Joint Rights and Obligations Act does not distinguish between types of deposits, nor is the language found in many "certificates of deposit" cases limited to the facts, a failing that applies as well to many of the "savings account" cases. Hence, though there are distinctions between a savings account and a deposit for which a certificate of deposit is issued,³⁰ an analysis of a Case One situation would be incomplete without taking into consideration the "certificate of deposit" cases. The converse is equally true to a Case Two situation.

B. CERTIFICATE OF DEPOSIT CASES

Six Illinois cases have been found concerning the creation of the right of survivorship in a deposit evidenced by a certificate of deposit, two of which were decided under the law as it existed

³⁰ As heretofore indicated, the courts have not, for this purpose, given these distinctions any particular consequence.

prior to the time Section 2 took its present form. In both of the two earlier cases, the survivor won the deposit, or a part thereof. In the first of these cases, *Lemon v. Estate of Grote*,³¹ the survivor prevailed as to one-half of the deposit upon a finding that the survivor was the original owner of that much of the deposit. The second of the two cases, *Erwin v. Felter*,³² decided that a certificate of deposit was a sufficient contract between the deceased depositor, the survivor and the bank to effectuate a transfer by way of a joint tenancy to support the survivor's claim to the entire deposit. The significance of this case is that it was decided at a time when joint tenancies were abolished in this state without any exceptions, and therefore stands for the proposition that a transfer of funds represented by a certificate of deposit may be accomplished without compliance with Section 2.

The next three certificate of deposit cases³³ were decided under Section 2 and went against the party claiming survivorship rights though these cases cannot be taken as authority that the right of survivorship may not be created by a properly drafted certificate of deposit. In two of these cases it was found that the certificate in question was not an adequate instrument in writing as required by Section 2 in that the right of survivorship was not explicitly mentioned in the instruments. Language appears in these cases indicating that the survivor may have prevailed as to the whole deposit if a gift was proved. This situation raises the question of whether one claiming the funds due under a certificate of deposit as a survivor on a gift theory must, in addition to proving the gift, show compliance with Section 2 as that section is construed by the later savings account cases.

The recent case of *Johnson v. Mueller*³⁴ suggests a negative answer to this question for, though it was held in that case that the certificate of deposit was a sufficient instrument in writing,

³¹ 203 Ill. App. 50 (1916).

³² 283 Ill. 36, 119 N. E. 926 (1918).

³³ *Lindner and Boyden Bank v. Wardrop*, 370 Ill. 310, 18 N. E. (2d) 89 (1939); *Engbrecht v. Engbrecht*, 323 Ill. 208, 153 N. E. 827 (1923); *Hamilton v. First National Bank*, 254 Ill. App. 55 (1929).

³⁴ 346 Ill. App. 199, 104 N. E. (2d) 651 (1952).

the court retreated from the rigid meaning given Section 2 in the Doubler and Wilson cases. The court in the Johnson case was careful to emphasize that the depositor had evidenced a donative intent and had given possession of the certificate of deposit to the survivor during his life.

Thus, the hiatus is reached; the above cases seem to indicate that a certificate of deposit would be a sufficient instrument in writing under Section 2. But this pleasant picture is darkened by the spectre of the construction given Section 2 in the savings account cases which would indicate that the typical certificate of deposit is not a sufficient writing. Strike two against the certificate of deposit is the probability that a transfer may not take place upon H's death unless there was a completed gift of the deposit during H's life. Since the facts do not positively show a present gift of the funds, W would probably not be entitled to the deposit by virtue of the right of survivorship.

It is difficult to generalize from the decided cases in this state concerned with joint bank accounts. But on the assumption that the latest cases more nearly reflect what the courts conceive to be the law, it is suggested that something in the nature of a double standard is being applied, depending upon whether the survivor is claiming as the donee of a gift or solely as one given rights by *prima facie* compliance with Section 2.

If the claimant seeks funds evidenced by a certificate of deposit as a donee the courts appear to be satisfied if the certificate merely provides for joint ownership with the right of survivorship expressed. If no gift of the certificate can be shown, it is doubtful whether any certificate of deposit, as such, will suffice as a sufficient instrument in writing to effectuate a transfer under Section 2.

If the claimant seeks funds as the donee of a savings account, the ordinary signature card would seem to be sufficient even though it is not signed by the survivor. But if a gift cannot be shown, then apparently the writing must be adequate to satisfy the elements of a specific contract as spelled out in the Wilson and Doubler cases.

The above analysis indicates that reliance upon the typical signature card as an effective instrument in writing to create the right of survivorship in a savings account is not safe practice, nor is it safe to attempt to create the right of survivorship with a certificate of deposit unless a gift is made. It has been seen that the law of gifts has been given vitality in this field and the suspicion is that this body of law has been resorted to by the courts to supply doctrine where Section 2 has proved inadequate. Anyone familiar with gift law will recognize it as an area where results are unpredictable in the absence of documented intention, again pointing to the risk involved in relying upon the signature card and certificate of deposit.

III. SUGGESTED CHANGES

The solution, if there is one, lies in legislative action. One suggestion has been offered in the form of a "Model Joint Bank Account Act."³⁵ Under this proposal, the opening of a joint bank account would need a somewhat more formal document than the Illinois statute now requires on its face. However, the effect of executing the instrument required, which could still take the form of a signature card in the case of saving or checking accounts, would be to create a conclusive presumption of a gift of the proceeds of the account to the survivor. Allowance would be made, of course, for questions of capacity, fraud and undue influence.

Another suggestion would be to rewrite Section 2 of the Joint Rights and Obligations Act, with the following specific objectives:

1. Remove the constructional handicaps created by the particular structure of Section 2 which place the elusive burden of proving strict compliance upon the one claiming survivorship rights.

2. Define the parts of Section 2 which do and do not apply to the creation of joint bank accounts.

³⁵ Kepner, "The Joint and Survivorship Bank Account—A Concept Without a Name," 41 Calif. L. Rev. 596, at 636 (1953).

3. Indicate specifically what steps must be taken in order to open a joint bank account and, if necessary, provide especially for each of the basic types of bank deposits.

4. Set forth the probative value of the writing used to create the joint bank deposit; that is, whether it is conclusive but with exceptions, *prima facie*, or presumptive.

It is believed that either one of the above proposals are workable both as a matter of law and in banking practice. At least a change along one of the lines outlined above would alleviate some of the uncertainty that is being generated by Section 2 as it now exists.